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No. 339

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1958

JEROME S. SPEVACK, *Petitioner*

v.

LEWIS L. STRAUSS, ET AL., *Respondents*

## BRIEF OF AMERICAN CHEMICAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN CHEMICAL SOCIETY

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### OPINIONS BELOW

The District Court rendered no opinion on entering its Findings of Fact and Conclusions of Law, and Order Denying Petitioner's Motion for a Preliminary Injunction. (R. 17, J.A. 17).[1]

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[1] References herein to the Court of Appeals record consisting of 134 pages used in conjunction with the previous Petition for a Writ of Certiorari filed in this matter (No. 641, October Term, 1957) are denoted "(R. ____)". References to the Court of Appeals Record certified to this Court incident to this Petition are denoted "(NR. ____)".

A previous opinion of the Court of Appeals for the District of Columbia Circuit (Petitioner's Appendix B, page 9a) is reported at 248 F. 2d 752.

The opinion of the Court of Appeals for the District of Columbia Circuit, rendered June 9, 1958 (Petitioner's Appendix D, page 14a), which forms the subject matter of the petition herein is not yet officially reported.

## JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1958. (Petitioner's Appendix D, page 16a). Petitioner's suggestion that the Court of Appeals should vacate its opinion and judgment contained in his "Answer to Order to Show Cause" (NR 47) which was filed on June 11, 1958, and which was similar to a Petition for Rehearing, was denied on June 24, 1958 (NR 53). The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254.

## INTEREST OF THE AMICUS CURIAE

The American Chemical Society is a scientific and educational organization chartered by Act of Congress. Its membership, which includes Petitioner, embraces more than 80,000 chemists and chemical engineers engaged in the practice of their profession, all of whom are vitally interested in the issues presented in this case by the decision of the Court below.

This Amicus Curiae, through the submission of its brief herein, supports the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to the end that that Court's decision be reviewed so that this Court may determine whether the Atomic Energy Act of 1954

(sometimes hereinafter called the "Act") authorizes the Atomic Energy Commission (sometimes hereinafter called the "Commission") to publish details of inventions revealed to it in confidence pursuant to statutory requirements, which inventions in turn are subjects of patent applications, without regard to rights of inventors in respect of their patent applications.

The importance of this question to members of the American Chemical Society cannot be overstated. Possibly in no other profession are so many engaged in both basic and applied research. From this research flow thousands of applications for patents each year, many of which, unless the decision below is reversed, would be subject to the arbitrary and confiscatory treatment proposed to be accorded to Petitioner herein.

In submitting its brief, this Amicus Curiae seeks to persuade this Court to review the question as to whether Congress has authorized the Commission to publish or otherwise publicly to disseminate the subject matter of a pending United States patent application, without the consent of the inventor, thereby depriving the inventor of his proprietary rights in said subject matter without due process or just compensation.

This Amicus Curiae filed a brief in support of Petitioner's previous petition for a writ of certiorari (No. 641, October Term, 1957). It otherwise has not participated in the proceedings below, nor has it knowledge of the record below because that record was impounded.

## QUESTIONS PRESENTED

The questions number (1), (2) and (3) presented by Petitioner herein are stated thus:

1 (WAS STATUTE CORRECTLY INTERPRETED?). Whether the Atomic Energy Act of 1954 is correctly interpreted to direct or authorize the Respondents to deprive a citizen of private property rights in his invention, forming the subject matter of a pending U. S. Patent application and disclosed to the U. S. Atomic Energy Commission (sometimes termed A. E. C. hereinafter) in confidence in accordance with law, by publishing and/or publicly disseminating said subject matter without regard to the proprietary right of the inventor thereof, without his consent, and to his detriment—

A *(Where Constitutional Authority is Limited to Property of the United States).* Where said Act must be construed to conform to the limited power given to Congress by the Constitution to dispose only of "*property belonging to the United States*", and not of property which is owned by a private citizen. (Article 4, Section 3 and Amendments IX and X of the Constitution of the United States);

B *(Where Respondents Proposed Disclosure Is Not Within the Limited Authority of the Atomic Energy Act).* Where consistent with its powers, Congress in said Act conferred upon the Respondents only limited authority to control dissemination of information: i.e.

(1) limited authority under Secs. 141, 144 and 123 for non-public communication to "other nations" cooperating and in privity with the A. E. C. of certain types of "Restricted Data" (as defined in Sec. 11(r) of the Act within

which definitions the Petitioner's invention does not fall), the Act expressly providing in Sec. 173 for compensation for such non-public communication of "Restricted Data" based on any patent application not belonging to the United States", (42 U. S. C. Secs. 2161, 2164, 2153, 2014(r) and 2223);

(2) limited authority under Secs. 2(b) and 3(b) for "permitting the property of the United States to be used by others" including by dissemination of "unclassified" scientific and technical information owned by the United States (or in the public domain), (42 U.S.C. Secs. 2012(b) and 2013(b));

(3) limited authority under Sec. 142(a) for determining the data "within the definition of Restricted Data" which can be published (by the owner thereof) and causing such data to be removed from the category of Restricted Data (defined in Sec. 11(r)) subject to the further limitation under Section 141(b) that dissemination of scientific and technical information relating to "atomic enegry" (as defined in the Act, within which definition Petitioner's invention does not fall) "should be permitted and encouraged" (42 U.S.C. Secs. 2162(a), 2014(r), 2161(b);

C (*Where There Is No Express Authority in the Act and There Are Specific Statutory Prohibitions*). Where said Act contains no *express direction or authority* to the Respondents to publish and/or publicly disseminate privately owned information disclosed to them in confidence, and no express provision for compensation for such action inferring

such direction or authority, but on the contrary provides in Sec. 146 (42 U.S.C. Sec. 2166) that the Respondents "shall have no power to control or restrict the dissemination of information other than that granted by this or any other law" and that "sections 141 to 145, inclusive" (42 U.S.C. Secs. 2161-2165) "shall not exclude the applicable provisions of any other laws", e.g.

(1) the general prohibition under penalty of fine and/or imprisonment and removal from office, against the publication or disclosure in any manner of privately owned information received by Respondents as government officials in confidence, 18 U.S.C. Sec. 1905, and

(2) the specific provision of the Patent Law that U. S. patent applications shall be "kept in confidence" by the Patent Office and hence by those in privity with it, 35 U.S.C. Sec. 122 and 37 C.F.R., Sec. 1.14;

D *(Where Respondents Authority Under the Patent Act to Deal With Information Here Involved Has Been Exhausted).* Where the citizen's invention does not fall within the definition of "Restricted Data" or "atomic energy" as defined in said Act and the sole authority of the Respondents for controlling dissemination thereof was derived, not from said Act, but from the Patent Act of 1952, 35 U.S.C., Secs. 181-188, and was exhausted when they took the following four steps:

(1) when they caused a secrecy order to be issued in said application under 35 U.S.C. Sec. 181, and

(2) when they refused to permit the Commissioner of Patents to consent to modification of the secrecy order to permit filing of applications for foreign patents under 35 U.S.C. Sec. 184, and

(3) when they caused the subject matter of the said application to be used by the United States Government as implicitly authorized by 35 U.S.C. Sec. 183, and

(4) when they subsequently, pursuant to 35 U.S.C. Sec. 181, notified the Commissioner of Patents that the secrecy order might be rescinded;

E. (*Where Respondents Proposed Publication Constitutes a Breach of Trust*). Where such publication and/or public dissemination without the inventor's consent would be in violation of the obligations of trusteeship placed upon Respondents by the Patent Act, 35 U.S.C. Secs. 122 and 181-188, the Regulations pursuant thereto, 37 C.F.R., Secs. 1.14 and 5.1 and the Criminal Law applicable to breach thereof 18 U.S.C. Sec. 1905;

F. (*Where Respondents Have Not Exercised Specific Authority to Acquire the Private Property Rights Involved for the United States*). Where Congress recognized the constitutional limitations on the government's power to dispose only of property of the United States, by specifically authorizing the A.E.C., by Secs. 161(g) and 261 of the Act, in the "performance of its functions" to acquire or purchase personal property or property rights, such as are here involved, from the owners thereof as agent for and on behalf of the United States (42 U.S.C. 2201(g) and 2017).

2 (Did the Court's Interpretation Render the Statute Unconstitutional as Authorizing a Disposal of Property Not Belonging to the United States?). Whether Sections 3(b), 141 and 141(b) of the Atomic Energy Act of 1954 (42 U.S.C. Secs. 2013 (b), 2161, and 2161(b))—interpreted to direct or authorize the Respondents to deprive a citizen of private property rights in his invention, forming the subject matter of a pending U. S. patent application, and disclosed to the A.E.C. in confidence in accordance with law, by publishing and/or publicly disseminating said subject matter without regard to the proprietary rights of the inventor thereof, without his consent, and to his detriment—are unconstitutional, *inter alia*, as in excess of the power given to Congress by Article 4, Section 3 and Amendments 9 and 10 of the Constitution of the United States, to dispose only of "property belonging to the United States", and *not* of property belonging to a private citizen.

3 (Did the Court's Interpretation Render the Statute Unconstitutional as Authorizing a Deprivation of Property Without Due Process or Compensation?). Whether an interpretation of Sections 3(b), 141 and 141(b) of the Atomic Energy Act of 1954 (42 U.S.C. Secs. 2013(b), 2161, 2161(b)) to authorize the Respondents to dispose of an inventor's personal property rights in his invention, disclosed to them in confidence, by publishing the subject matter thereof without his consent and without first lawfully acquiring or purchasing for the United States the right to so dispose of such property as elsewhere provided for in the Act, renders the Act unconstitutional as regards said sections, *inter alia*, as authorizing a deprivation of private property without due process of law, or by taking thereof without provision for just compensa-

tion, as required by the 5th Amendment of the Constitution, where the Act does not expressly authorize such action, and does not implicitly authorize such action by an express provision for just compensation therefor.

This Amicus adopts the statement of the Petitioner as to these three questions.

## CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Constitutional provisions, Statutes, and Rules involved, United States Constitution, Article 1, Section 8; Article 4, Section 3; 5th, 9th and 10th Amendments; Atomic Energy Act of 1954, Secs. 1, 2, 3, 11, 123, 141, 142, 144, 146, 161, 173, 261; Patent Act of 1952, Secs. 122, 181, 184; Code of Federal Regulations, Title 37, Part 1, Sec. 1.14; Part 5, Sec. 5.1; 18 U.S.C., Sec. 1905, 28 U.S.C., Sec. 1491; Federal Rules of Civil Procedure, Rule 56; are set forth in Petitioner's Appendix A, pages 1a-9a. In addition this Amicus Curiae cites the following sections of the Atomic Energy Act of 1954, the applicable portions of which are set forth in Appendix A, *infra:* 151(a), (b); 152; 153(a), (g); 158.

## STATEMENT OF THE CASE

In the interest of brevity, this Amicus Curiae incorporates by reference herein the statement of the case as set forth in the Petitioner's Petition for Writ of Certiorari herein.

## REASONS FOR GRANTING THE WRIT

**1. The Decision of the Court Below That the Atomic Energy Act of 1954 Authorizes the Atomic Energy Commission to Publish and Otherwise Publicly to Disseminate the Subject Matter of a Pending United States Patent Application, Thereby Destroying the Proprietary Rights of the Inventor Therein, Is Contrary to the Language and Meaning of That Act.**

In addition to the reasons set forth by the Petitioner in his Petition, this Amicus submits that there is another and perhaps more basic reason why this Court should review the decision of the Court of Appeals.

The first opinion of the Court below, dated September 19, 1957, states in part as follows:

> "It is also plain that Congress authorized the Commission to take action of this general sort; i.e., to disseminate technical information in the field of atomic energy. Congress did not leave the matter to implication. It expressly stated its intention to provide 'a program for the dissemination of unclassified scientific and technical infortion and for the control, dissemination, and declassification of Restricted Data, subject to appropriate safeguards, so as to encourage scientific and industrial progress . . . It shall be the policy of the Commission to control the dissemination and declassification of Restricted Data in such a manner as to assure the common defense and security. . . . The dissemination of scientific and technical information relating to atomic energy should be permitted and encouraged . . .' 42 U.S.C. (Supp. IV §§ 2013(b), 2161, 2161(b)." (Petitioner's App. A, page 9a).

Although the Court of Appeals asserted that Congress did not leave the matter to implication, nevertheless, it is unable to indicate any specific authority for the Respondents' proposed action. To the contrary,

the Court below relies upon Congress having "authorized the Commission to take action of this general sort; i.e., to disseminate technical information in the field of atomic energy", notwithstanding the specificity with which Congress has authorized dissemination of certain kinds of such technical information.

The second opinion of the Court of Appeals, dated June 9, 1958, did not elucidate further upon the question of Congressional authorization of "this sort" of publication. (Petitioner's Appendix D, page 15a).

Accordingly, this reason for granting a writ of certiorari retains precisely the same validity as upon the previous presentation of this cause to this Court. (Petition for a Writ of Certionari, No. 641, October Term, 1957, and Brief of this Amicus in support thereof).

It must be observed that the provisions relied upon by the Court of Appeals in its earlier opinion are quoted from those sections establishing the purpose of *control of information*, i.e., in respect of the Commission's authority to *restrict* the dissemination of information. There is no language in these sections or elsewhere in the Act evincing an intention to authorize the Commission to disseminate information which it otherwise would not have the right to publish, and, more particularly, to publish the subject matter of a pending United States patent application, thereby destroying the proprietary rights of the inventor.

To the contrary, the Atomic Energy Act of 1954 recognizes that inventors do have proprietary rights in their inventions, discoveries and patents in the area of atomic energy. Although the Act does in many instances limit the proprietary rights of inventors, such limitations and restrictions are set forth with specificity. For instance, consider the following examples:

a) Patents may *not* be granted for any invention useful in the utilization of special nuclear material or atomic energy in an atomic weapon.[1] 42 U.S.C. § 2181(a)(b). (Appendix A, *infra*, page 1a). This implies that patents may be granted as to other inventions in or related to the field of atomic energy.

b) Certain inventions conceived under contracts with the Atomic Energy Commission are deemed to have been made or conceived by the Commission, although the Commission may waive its claim to such inventions and allow the inventor to be issued a patent. 42 U.S.C. § 2182. (Appendix A, *infra*, pages 1a-2a). It is here implied that as to inventions *not* conceived during Commission contracts, inventors retain full proprietary rights in their inventions, including the right of secrecy of the subject matter of their patent applications.

c) To guard against patents granted after enactment of the Act for inventions or discoveries of primary use in the utilization or production of special nuclear material or atomic energy being used in violation of antitrust laws, a procedure is established to provide relief against the monopolistic use of such patents. 42 U.S.C., § 2188. (Appendix A, *infra*, page 3a). Under these circumstances, reasonable royalty fees are provided for patent owners. *Ibid.* But Respondents apparently take the position that whereas law violators are protected in their property rights, nevertheless, Petitioner, against whom no wrongdoing is asserted, may be deprived of his rights without due process or just compensation.

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[1] The definition of "special nuclear material" at 42 U.S.C. § 2014 (t) (Appendix A, *infra*, page 1a) does not include the subject matter of Petitioner's patent application. Nor is the subject matter of Petitioner's patent application used in the utilization of atomic energy in atomic weapons, according to the Petition for a Writ of Certiorari.

The petition for certiorari does not indicate that Petitioner's invention or patent application is particularly covered by any of the foregoing sections of the Act, nor does this Amicus Curiae so imply. However, these sections suggest that Congress has circumscribed in such detail the rights and obligations of inventors in the field covered by the Atomic Energy Act that it reasonably may be concluded that the property rights of inventors in their discoveries are limited only in the manner provided by the Act.

The Act does not provide for the destruction of Petitioner's proprietary right, which would be the effect of Respondents' proposed publication.

It does not grant to Respondents authority to publish the subject material.

It makes no provision for just compensation upon destruction of Petitioner's proprietary right, although in other instances where the statute recognizes a proprietary right in the inventor and provides for a deprivation or limitation of such right, just compensation also is provided: e.g. 42 U.S.C., §§ 2181, 2183(g), 2183, 2223 (Appendix A, *infra*, pages 1a, 2a, 3a). The provision in 42 U.S.C., § 2223 for just compensation upon communication by the Commission of *Restricted Data* based on patent applications not belonging to the United States raises a serious question as to the authority of the Commission to publish *Unrestricted Data* based on patent applications not belonging to the United States. The proprietary right in the subject matter of a patent application is not diminished by the absence of security classification of the particular invention. Petitioner's property is not within the category of Restricted Data, as defined in 42 U.S.C., § 2014 (r) (Petitioner's App. A, page 2a).

Accordingly, this Amicus Curiae respectfully submits that this Court should review the decision of the Court of Appeals so as to determine whether that Court erred in holding that Congress had authorized the Commission to publish or otherwise publicly to disseminate the subject matter of a pending United States patent application, thereby destroying the proprietary rights of the inventor therein.

Inasmuch as the case at bar challenges directly the statutory authority of Respondents to make the proposed publication, it is clearly distinguishable from this Court's ruling in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949). This is not a suit against the United States, consented or unconsented.

In the light of the foregoing, unless this Court reviews the decision of the Court of Appeals, the mandate of this Court in its order of March 3, 1958, granting the previous petition for certiorari herein "to determine, in light of the amended complaint, the issues raised by petitioner's appeal" (Petition for Writ of Certiorari, pages 20-21), will have been ignored. Therefore, and there being grave doubt that the Court below has construed the statute correctly, and there flowing from the decision below grave and adverse consequences upon the scientific resources of this country when they are most needed in full strength, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

**2. If the Decision of the Court Below Is Correct, the Atomic Energy Act of 1954 Is An Unconstitutional Deprivation of Property Without Due Process or Just Compensation.**

The argument that the Atomic Energy Act of 1954 does *not* authorize the Atomic Energy Commission to publish the subject matter of a pending United States patent application, thereby destroying the proprietary

rights of the inventor therein, where there is no provision for just compensation, is strongly fortified by the constitutional consequences of a contrary conclusion.

The fact that Congress made provision for *other* takings of property under the Act not only raises a question as to the authority of the Respondents to publish the Petitioner's property, as discussed, *supra*, but also and by way of corollary, permits an inference under the familiar principle of statutory construction, *expressio unius est exclusio alterius*, that Congress did not intend that the Petitioner be compensated for this particular kind of "taking" of his property. If Respondents had been granted such authority, without provision for compensation, the Act would have been to that extent an unconstitutional deprivation of the Petitioner's rights under the Fifth Amendment, inasmuch as the subject matter of a patent application is a property right recognized in Article 1, Section 8, United States Constitution, to be protected against appropriation by government.

In its opinion of June 9, 1958, after remand by this Court, the Court of Appeals held that "the Constitution does not forbid the publication" proposed by Respondents (Petitioner's App. D, page 15a). However, the Court of Appeals made no finding upon which to sustain this conclusion. It failed to find that the proposed action was authorized, other than that the Commission was authorized "to take action of this general sort"; it failed to find that the Petitioner's property right had become property of the United States so as to permit the government to dispose thereof, i.e., it failed to find that the government had acquired a proprietary right in the Petitioner's property; it failed to find that the proposed publication would be a taking for which just compensation must be paid. The

Court of Appeals indeed failed completely to determine the legal nature or effect of the proposed publication.

The Court of Appeals noted that the Court of Claims has jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress, citing the general jurisdictional statute, 28 U.S.C., § 1491 (Appendix A, *infra*, page 4(a)). In the instant case, however, the Court of Appeals did not find that this was a taking in the constitutional sense, nor that a claim properly would be founded upon the statute, since the Act makes no provision for compensation for publication of *unclassified* material, although compensation is provided for a taking of *Restricted Data*.

The Court of Appeals further relied upon *Larson* v. *Domestic & Foreign Corp., supra*. This case is distinguishable from *Larson* not only as to the challenge of the Respondents' statutory authority, but also in that the purport of the quoted language is hypothesized upon a finding of a taking to support an action for compensation.

Finally the Court of Appeals, in concluding that "the Constitution does not forbid" the Respondents' proposed action, relied upon *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18 and *United States* v. *Causby*, 328 U.S. 256. These cases are distinguishable from the case at bar in that (1) the governmental action in those cases clearly was authorized by statute; and (2) the statute in the instant case does not provide "a plain and adequate remedy" for the Petitioner. To the contrary, inasmuch as the Court of Claims, in an action for just compensation, would not be bound by the decision of the Court of Appeals herein, and in

view of the doubtful basis for the decision of the Court of Appeals, there is a distinct likelihood of a subsequent finding by the Court of Claims that the Respondents' proposed action is not authorized by the statute, and that, therefore, the deprivation of Petitioner's property would not constitute a taking for which there must be just compensation under the Fifth Amendment.

In view of the Court below having upheld the right of the Respondents to deprive the Petitioner of his property right without even determining the nature and effect in law of the Respondents' proposed action, in view of the doubt as to whether the Court below has construed the statute correctly, in view of the constitutional consequences of an erroneous construction thereof, and in view of the serious prejudice and economic loss thereby resulting not only to the Petitioner but to many other scientists, it is respectfully submitted that the Petition for a Writ of Certionari should be granted, so that the important issues presented therein may be determined as required by this Court's order of March 3, 1958, notwithstanding the failure of the Court of Appeals to do so.

## CONCLUSION

WHEREFORE, It is respectfully submitted that for the reasons given Petitioner's Petition for a Writ of Certiorari should be granted.

Respectfully,

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